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CAPTION.

BE IT REMEMBERED, That at a regular and stated term of the District Court of the United States in the Fifth Circuit and in and for the Western District of Texas, at Waco, Texas, begun and holden at Waco, Texas, on the 24th day of February, A. D. 1913, and which term adjourned on the 4th day of March, A. D. 1913, United States District Judge T. S. Maxey presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

M. C. H. PARK, Trustee in Bankruptcy
of Slayden-Kirksey Woolen Mill,
Bankrupt,

versus No. 102 At Law.

W. W. CAMERON and E. R. BOLTON.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

M. C. H. Park, Trustee, Etc.,

vs. No. 102 Law.

W. W. Cameron and E. R. Bolton.

Now comes M. C. H. Park, hereinafter styled plaintiff and with leave of the court files this his first amended original petition in lieu of his original petition heretofore filed and bringing this suit in his capacity as the duly elected, qualified and acting trustee in Bankruptcy of Slayden-Kirksey Woolen Mill, a corporation formed under and by virtue of the laws of the State of Texas and heretofore doing business in the city of Waco, McLennan county, Texas, and as plaintiff complains of W. W. Cameron and E. R. Bolton, who also reside in McLennan county Texas and for cause of action respectfully represents:

That on or about April 10, 1911, the said Slayden-Kirksey Woolen Mill, transferred to the defendants herein, and for the purpose of defrauding the creditors of said corporation, the sum of $8250.00 in cash; that at the time said moneys were so received by the defendants such moneys were the property of the Slayden-Kirksey Woolen Mill.

And this plaintiff would further show that some time prior to Dec. 8, 1909, the defendants herein were the holders and owners of a large amount of the capital stock of said defunct corporation, both preferred and common, and were members

of the board of directors thereof, and the said W. W. Cameron was its treasurer and so remained until the adjudication in bankruptcy of said corporation, as hereafter more fully stated; that 275 shares of the capital stock of said corporation were heretofore owned by one Altgeld, who having ascertained that the stock was of little value endeavored to sell, and offered the same frequently in the open market, at a very low figure; that the defendants herein, for the purpose of preventing the depression in the open market of the value of the capital stock of said corporation, purchased the said 275 shares of the stock;

That thereafter, and to re-imburse themselves for the amount paid to the said Altgeld, these defendants sold these 275 shares to one A. V. Harris, taking in payment therefor two promissory notes executed by A. V. Harris for $4125, each dated Dec. 8, 1909, and due twelve months after date, one said notes being payable to the defendant herein W. W. Cameron and the other being payable to the defendant herein E. R. Bolton.

That to secure the payment of said notes there were attached thereto, as collateral security certificates for the 275 shares of stock so sold by the said defendants herein to the said Harris.

That after the purchase of said stock by the said Harris he ascertained that said defendants had overreached him, in the sale of said stock; that the consideration for his said note had wholly failed, said stock being of no value, and he denied that he was liable on the notes executed by him to the defendants as hereinbefore more fully set out.

That thereafter and for the alleged purpose of enforcing the payment of said notes, on or about Jan. 24, 1911, the defendant herein, W. W. Cameron commenced in the District Court for the 19th Judicial District, McLennan county, Texas, an action at law, alleging in the petition filed therein that he, the plaintiff therein, W. W. Cameron was the owner and holder of the two notes hereinbefore more fully described, and he prayed for judgment against the defendant in said suit, the said A. V. Harris, for the amount of said notes, and for a foreclosure of the lien on the collateral attached thereto as hereinbefore more fully set out.

That thereafter, on or about April 10th, 1911, the defendants conspiring with one S. F. Kirksey, Jr., at that time the General Manager and in charge of the affairs of the said corporation, induced the said S. F. Kirksey, Jr., to make a pretended purchase of said stock from defendants, but in fact, for and on account of said defunct corporation and to use in payment of his pretended purchase of said stock the funds of said corporation in said sum of $8250.00, said misapplication of funds being wrongful to the knowledge of defendants, they being then directors of said corporation, and knowing its financial condition.

That in truth and in fact this pretended purchase was wholly void in that said corporation at the time of said pretended purchase had no funds with which to purchase its own capital stock and had no legal powers so to do; that said corporation was at the time of said frauds of the defendants heavily involved; was obtaining all possible extensions of its indebtedness and said transactions were had in contemplation

of bankruptcy or other insolvency liquidation and of actual insolvency, and all such conditions shortly afterwards became notorious.

That said purchase was a pretense to purchase from these defendants the amount of said stock, and that the funds of said corporation were directly transferred to the said two defendants by the checks of the corporation, drawn by said Kirksey, Jr., on or about April 10th, 1911, one in the sum of $4125.00 to the order of defendant W. W. Cameron and the other in the same sum to the order of the defendant E. R. Bolton and said defendants received and retained the funds of the corporation upon said checks in the full amount of same and thereby have depleted the funds of said corporation to the injury of its creditors.

That at the time said checks were so issued to the order of said defendants and received by them, they knew, or by the exercise of reasonable and due diligence, could have known, that the said defunct corporation was not indebted to the said S. F. Kirksey, Jr., in the amount of said checks, or in any amount whatsoever; that they also knew that the said defunct corporation was wholly and hopelessly insolvent and that the stock so pretended to be sold by them, either to the said Kirksey, or to the said corporation, was of no value whatever; that at the time said moneys were so received by the defendants, they and each of them knew that such moneys were the property of the said Slayden-Kirksey Woolen Mill.

That the said defunct corporation did not in any manner, shape or form authorize said transactions, nor ratify same, nor derive any benefit whatever from the payment by it of the said sum to the defendants herein or by the delivery to it of

said stock, and that the defendants herein were at all times fully aware of all of the facts herein stated.

That to conceal said misapplication of funds said defendants caused entries to be made upon the books of said corporation, making said transaction appear to be a purchase of said stock by Kirksey, Jr., but such appearance was contrary to the facts, and the defendants knew said S. F. Kirksey, Jr., was not to repay said funds to said corporation and it was understood that same was not to be repaid to it and that said liability was not in fact a bona fide one nor intended to be a bona fide one and same was afterwards pursuant to the original conspiracy, cancelled and retired.

And this plaintiff would further show that on or about the 24th day of Jany. 1912, the said corporation, Slayden-Kirksey Woolen Mill, was duly adjudged a bankrupt; that this your petitioner as herenbefore stated, was duly elected trustee of the creditors of said corporation, and that its affairs are now being administered before the Honorable referee in bankruptcy of this Honorable Court, and that by such election this plaintiff became vested with and entitled to all the assets and choses in action of said bankrupt corporation, including the claim hereinbefore more fully stated against these defendants herein;

That there will be a deficiency between the amount realized from all of the assets of this corporation and the amount due to its creditors, much larger than the amount sought to be recovered herein;

Wherefore plaintiff prays, citation having issued, and that upon a hearing hereof he, in his capacity as aforesaid,

may have judgment against the defendants and each of them, for the aforesaid amount, together with interest thereon at the rate of 6% per annum from the date of its payment, and for costs of suit, and he prays for such other and further relief that he may be entitled to at law or equity.

J. D. WILLIAMSON,
KLEBURG & NEETHE,
SPENCE, KNIGHT, BAKER & HARRIS,
Attorneys for Plaintiff.

Endorsed as follows, to-wit: (No. 102 Law. M. C. H. Park, Trustee, vs. W. W. Cameron and E. R. Bolton. Plaintiff's First Amended Original Petition. Filed 27th day of February, 1913, at 2:15 o'clock p. m. D. H. Hart, clerk. By W. D. Rondthaler, deputy.)

UNITED STATES OF AMERICA

Western District of Texas, at Waco.

Citation in District Court.

THE PRESIDENT OF THE UNITED STATES

To the Marshal of the Western District of Texas—Greeting:

You are hereby Commanded to Summon W. W. Cameron and E. R. Bolton, Waco, each a resident citizen of the County of McLennan, in the Western District of Texas, if to be found therein, to be and appear before the Honorable District Court of the United States, at a court to be holden in and for said District, at Waco, Texas, on the fourth Monday, being the 24th day of February, A. D. 1913, and the first day of the next regular term of said Court in course, to answer a petition and complaint exhibited and filed in said Court on the 14th day of January, A. D. 1913, in a suit numbered on the docket of said Court No. 102 Law, wherein M. C. H. Park, Trustee, is plaintiff, and W. W. Cameron and E. R. Bolton are defendants.

The nature of the plaintiff's demand is as follows, to-wit: Suit to recover the sum of $8250.00 alleged to have been paid defendants by Slayden-Kirksey Woolen Mill while insolvent and for costs and interest & etc., as more fully appears from the attached certified copy of plaintiff's petition filed herein.

And you will deliver to the defendants, W. W. Cameron and E. R. Bolton, a true copy of this writ and the accompanying certified copy of plaintiff's original petition.

HEREIN FAIL NOT, but have you then and there before said Court this writ, with your action thereon, showing how you have executed the same.

WITNESS, the Honorable T. S. MAXEY, Judge of the District Court of the United States, for the Western District of Texas, and the seal (SEAL) of said District Court hereto affixed, at Waco, Texas, this 14th day of January, A. D. 1913. Issued same day.

D. H. HART,
Clerk of said Court.

By W. D. RONDTHALER,
Deputy.

Received this Citation on January 14th, A. D. 1913, at Waco, Texas, and have executed the same by delivering a true copy of same together with a certified copy of plaintiff's original petition to E. R. Bolton, in person, on January 14th, 1913, and to W. W. Cameron, in person, on January 20, 1913, as I am within directed.

BERT J. McDOWELL,
United States Marshal.

By W. S. EAKIN, Deputy Marshal.

Endorsed as follows, to-wit: (No. 102 Law. U. S. District Court, Western District of Texas, at Waco. M. C. H.

Park, Trustee, vs. W. W. Cameron and E. R. Bolton. Original citation for W. W. Cameron and E. R. Bolton, Waco, McLennan County. Issued 14th day of January, 1913. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy. Returned and filed January 25th, 1913. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy. Received Jan. 23, 1913. Marshal's Docket, No. 1013.)

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER.

In the District Court of the United States for the Western District of Texas, Waco Division.

M. C. H. PARK, TRUSTEE,
Plaintiff,

vs. No. 102. At Law.

W. W. Cameron and E. R. Bolton,
Defendants.

Now come W. W. Cameron and E. R. Bolton, defendants in the above numbered and entitled cause, by their attorneys, leave of the court first having been had and obtained, and file this their first amended original answer in lieu of their original answer heretofore filed herein, and in reply and answer to plaintiff's first amended original petition filed herein say:

I.

Defendants demur, except and object to the jurisdiction of this Court, and say that this court is without jurisdiction to entertain, hear and determine plaintiff's cause of action as alleged herein, and grant plaintiff relief as in his first amended petition alleged and prayed for, and of this said defendants pray judgment of the court.

II.

Defendants except and demur generally to plaintiff's said amended petition and say that the allegations of fact and

averments in said amended petition contained are insufficient in law to constitute any cause of action, and of this said defendants pray judgment of the court.

III.

Further answering herein, if required so to do, said defendants, and each of them, deny all and singular the allegations and averments in plaintiff's said amended petition contained, and demand strict proof of same, and of this they put themselves upon the country.

IV.

Answering specially, if need be, defendants, and each of them, allege and represent unto the court as follows:

That on, to-wit, April 10, 1911, defendants were the legal holders and owners of two promissory notes executed by A. V. Harris, of date December 8, 1909, for $4125.00 each, and due twelve months after date, one of said notes being payable to the defendant, W. W. Cameron and the other payable to the defendant E. R. Bolton, as in plaintiff's said amended petition alleged. That A. V. Harris put up as collateral security to secure the payment of said notes 275 shares of the capital stock of the Slayden-Kirksey Woolen Mill, of which stock, shares $100.00 each, said Harris was the owner. Said notes being unpaid and valid, subsisting obligations against said Harris. That said Harris was then solvent, a resident of the State of Texas, and the owner of much property situated in the State of Texas, over and above his legal exemptions, subject to execution and said notes were worth the full face value of same, principal, interest

and attorney fees, aside from the value of said 275 shares of capital stock of the Slayden-Kirksey Woolen Mill so put up by said Harris and attached to said notes as collateral security thereto.

That these defendants had no ownership of title or interest in said stock except as collateral security for said notes and did not sell or undertake to sell said stock to said Slayden-Kirksey Woolen Mill or any other corporation or person.

That on or about April 10, 1911, as these defendants are informed and believe, said Slayden-Kirksey Woolen Mill purchased said two notes with the said 275 shares of capital stock of said mill attached to said notes as collateral security thereto, and paid to each of these defendants the sum of $4125.00 therefor. That these defendants acted in perfect and entire good faith and without any notice whatever of any fraudulent or improper conduct, if any, on the part of S. F. Kirksey, Jr., in the premises; and defendants expressly deny that they conspired with the said S. F. Kirksey, Jr., General Manager of and who was in charge of the affairs of the Slayden-Kirksey Woolen Mill, and induced him to make a pretended purchase of said stock attached to said notes as collateral, as aforesaid, for or on account of said mill, or to use the funds of said corporation in the sum of $8250.00, or any other sum in payment for the pretended purchase of said stock, as in plaintiff's amended petition alleged.

That at the time of the purchase of said notes, as aforesaid, the same were delivered to said S. F. Kirksey, Jr., who was General Manager and in charge of the affairs of said Slayden-Kirksey Woolen Mill, and thereupon defendants dismissed their suit against said Harris on said notes, which was

then pending in the District Court of McLennan County, Texas. And defendants further allege that soon thereafter the said Harris left the State of Texas and moved to the State of California, where they are informed and believe he has continuously resided since.

That said notes have never been returned to defendants nor has plaintiff, or any other person, ever offered to return or tender back to defendants said notes since same were so delivered to said Slayden-Kirksey Woolen Mill, as aforesaid. Wherefore defendants say and here plead that plaintiff is estopped to assert or claim that these defendants are in any wise liable herein.

Wherefore defendants pray that they be allowed to go hence without day and recover of plaintiff all costs herein incurred.

SLEEPER, BOYNTON & KENDALL,

Attorneys for Defendants.

(Endorsed as follows, to-wit: District Court of the United States for the Western District of Texas, Waco Division. No. 102 Law. M. C. H. Park, Trustee, Plaintiff, vs. W. W. Cameron and E. R. Bolton, Defendants. Defendants First Amended Original Answer. Filed February 28th, 1913. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.)

JUDGMENT.

(Entered February 28, A. D. 1913, in the Minutes of the United States District Court for the Western District of Texas, at Waco, Vol. 4, pages 551-2.)

M. C. H. Park, Trustee of Slayden-Kirksey Woolen Mill, Bankrupt,

vs. No. 102.

W. W. Cameron, et al.

This day came on to be heard the special exception of the defendants, W. W. Cameron and E. R. Bolton, to the effect that this Court is without jurisdiction to hear and determine this cause, and both parties appearing by attorneys, said special exception was argued, and the Court being of the opinion that it is without jurisdiction to hear and determine a suit for the recovery of money paid by a bankrupt under Section 23b of the Acts of Congress, relating to bankruptcy, as amended in 1910, and under Section 70e of the Acts of Congress, relating to bankruptcy, as amended in 1903, and that this cause should be dismissed, but without prejudice to the right of the plaintiff to file suit in such other form and such other forum as he may deem proper:

It is therefore ordered, adjudged and decreed by the Court that the said special exception of the defendants, W. W. Cameron and E. R. Bolton, to plaintiff's first amended original petition, to the effect that this Court is without jurisdiction to hear and determine this action, be and the same is hereby sustained, and this action is hereby dismissed,

and costs of suit adjudged against the plaintiff; but without prejudice to the right of the plaintiff to further prosecute this action in such other form or forum as he may be advised. To which action and ruling of the Court the plaintiff, M. C. H. Park, trustee in bankruptcy of the estate of Slayden-Kirksey Woolen Mill, bankrupt, then and there in open Court duly excepted and his exception is hereby allowed.

A term of thirty days is hereby allowed for preparing and filing his bill of exceptions in this behalf.

PLAINTIFF'S BILL OF EXCEPTIONS.

In the District Court of the United States for the Western District of Texas, at Waco.

M. C. H. Park, Trustee,

vs. No. 102. At Law.

W. W. Cameron and E. R. Bolton.

This is an action at law, originally brought by plaintiff in error herein, as trustee of the estate of Slayden-Kirksey Woolen Mill, a bankrupt, in the District Court of the United States for the Western District of Texas, at Waco, by first amended petition, as appears in the record of this case: Said action being to recover the sum of $8250.00, from the defendants W. W. Cameron and E. R. Bolton, and praying for judgment against defendants, as more fully appears from the petition in the record in this cause, which is here referred to and the same made a part of this bill of exceptions.

The defendants, W. W. Cameron and E. R. Bolton, defendants in error herein, filed exception and demurrer to the jurisdiction of the court; and further answered by general demurrer, special exception, general denials and special denials; all of which are fully and specifically set out in their answer, incorporated in the record in this cause, to which reference is here made, and same made a part of this bill of exceptions.

The case came on regularly for trial, before the Honorable T. S. Maxey, judge of the District Court of the United

States, as aforesaid; Messrs. Rhodes S. Baker, John Neethe and J. D. Williamson, appearing as counsel for plaintiff; and Messrs. Sleeper, Boynton & Kendall, appearing as counsel for defendants; whereupon the following proceedings were had:

The defendants presented to the Court their demurrer and exception to the jurisdiction of the court, as incorporated in their answer herein, as follows:

(1)

"Defendants demur, except and object to the jurisdiction of this court, and say that this court is without jurisdiction to entertain, hear and determine plaintiff's cause of action as alleged herein, and grant plaintiff relief as in his first amended petition alleged and prayed for, and of this defendants pray judgment of the court," which exception and plea to the jurisdiction, after the hearing of argument thereon, and due consideration thereof by the court, was sustained, and judgment entered thereon, as follows, to-wit:

"Entered as of February 28th, 1913.

This day came on to be heard the special exception of the defendants, W. W. Cameron and E. R. Bolton, to the effect that this court is without jurisdiction to hear and determine this cause, and both parties appearing by attorneys, said special exception was argued, and the court being of the opinion that it is without jurisdiction to hear and determine a suit for the recovery of money paid by a bankrupt, under Section 23b, of the Acts of Congress, relating to bankruptcy, as amended in 1910, and under Section 70e, of the Acts of

Congress, relating to Bankruptcy, as amended in 1903, and that this cause should be dismissed, but without prejudice to the right of the plaintiff, to file suit in such other form and forum, as he may deem proper.

It is therefore ordered, adjudged and decreed by the court, that the said special exception of the defendants, W. W. Cameron and E. R. Bolton, to plaintiff's first amended original petition, to the effect that this court is without jurisdiction, to hear and determine this action, be and the same is hereby sustained, and this action is hereby dismissed, and costs of suit adjudged against the plaintiff; but without prejudice to the right of the plaintiff to further prosecute this action in such other form or forum as he may be advised; to which action and ruling of the court, the plaintiff, M. C. H. Park, trustee in bankruptcy, of the estate of Slayden-Kirksey Woolen Mill, bankrupt, then and there in open court duly excepted, and his exception is hereby allowed.

A term of thirty days is hereby allowed for preparing and filing his bill of exceptions in this behalf." To which judgment the plaintiff, at the time, in open court excepted, and hereby tenders this bill of exceptions to the Court to sign and seal, and the Court does hereby sign and seal the same, and said bill of exceptions by order of the court made a part of the record herein.

Now, in furtherance of justice, and that right may be done the plaintiff presents, as his bill of exceptions in this cause, and prays that same may be considered and allowed, signed

and certified by the judge, as is provided by law, and made a part of the record, and same is accordingly done.

This 29th day of March, A. D. 1913.

T. S. MAXEY,
United States District Judge.

The above bill was this day submitted to us and we approve same as the action taken and proceedings had on trial of said cause.

SLEEPER, BOYNTON & KENDALL,
Attorneys for Defendants.

March 28th, 1913.

(Endorsed as follows, to-wit: No. 102. At Law. M. C. H. Park, Trustee of Slayden-Kirksey Woolen Mill, Bankrupt, vs. W. W. Cameron and E. R. Bolton, Plaintiff's Bill of Exceptions. Filed March 29, 1913. D. H. Hart, Clerk.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

M. C. H. Park, Trustee of the Estate of
Slayden-Kirksey Woolen Mill,
a Bankrupt,

vs. No. 102 At Law.

W. W. Cameron, et al.

To the Honorable T. S. Maxey, Judge of the District Court of the United States for the Western District of Texas:

Now comes M. C. H. Park, trustee of the estate of Slayden-Kirksey Woolen Mill, a bankrupt, plaintiff in the above entitled cause, by Rhodes S. Baker, John Neethe and James D. Williamson, his attorneys, and petitions this Honorable Court, for an order, allowing said plaintiff, to prosecute a writ of error, to the Supreme Court of the United States, to remove to said Court, for a review thereof, the record in this cause, lately pending in said United States District Court, for the Western District of Texas, at Waco; wherein M. C. H. Park, Trustee, of the estate of Slayden-Kirksey Woolen Mill, a bankrupt, plaintiff in error, was plaintiff, and W. W. Cameron and E. R. Bolton, both resident citizens of McLennan county, Texas, defendants in error, were defendants; and particularly the record of the judgment, rendered by said District Court, in said cause, wherein the said court below, sustained the demurrer of the defendants, to plaintiff's

first amended original petition, to the effect that said court, was without jurisdiction to hear and determine said action, and dismissed said plaintiff's cause, at his cost.

Said judgment was duly entered on the records and minutes of said court, on the 28th day of February, A. D. 1913. That plaintiff be allowed to perfect this writ of error, without filing bond, as is in such cases provided, by the Acts of Congress, relating to bankruptcy.

Your petitioner respectfully states, that he has this day filed herewith, his assignment of errors, committed by the court below, in said cause, and intended to be urged by your petitioner, and plaintiff in error, in the prosecution of this, his suit in error.

This 18th day of August, A. D. 1913.

RHODES S. BAKER,
JOHN NEETHE,
J. D. WILLIAMSON,

Attorneys for M. C. H. Park, Trustee,
Plaintiff in Error.

Let a writ of error issue in the above cause, as prayed for in the petition, without the filing of bond, on said writ of error, as is in such cases provided, under the Acts of Congress, relating to bankruptcy.

This 1st day of October, A. D. 1913.

T. S. MAXEY,

Judge, United States District Court.

(Endorsed as follows, to-wit: No. 102 At Law. M. C. H. Park, Trustee of the Estate of Slayden-Kirksey Woolen Mill, a Bankrupt, vs. W. W. Cameron, et al. Petition of M. C. H. Park, Trustee, for writ of error. Filed Oct. 1, 1913. D. H. Hart, Clerk.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

M. C. H. Park, Trustee of the Estate of Slayden-Kirksey Woolen Mill, a Bankrupt,

vs. No. 102. At Law.

W. W. Cameron and E. R. Bolton.

To the Honorable T. S. Maxey, Judge of said Court:

Comes now, M. C. H. Park, trustee of the estate of Slayden-Kirksey Woolen Mill, bankrupt, plaintiff, and files the following assignment of errors, upon which he will rely upon his prosecution of writ of error, in the above cause.

FIRST:

That the United States District Court, in and for the Western District of Texas, sitting at Waco, erred in sustaining the special exception and demurrer, interposed by defendants W. W. Cameron and E. R. Bolton, to the effect that the District Court was without jurisdiction to hear and determine plaintiff's cause of action, and in dismissing said cause of action.

SECOND:

The said Court erred in sustaining the special exception of defendants, W. W. Cameron and E. R. Bolton, to the effect that the United States District Court was without power and jurisdiction to hear and determine this suit, under Section

23b of the Acts of Congress, relating to bankruptcy, as amended in 1910; and under Section 70e, of the Acts of Congress relating to bankruptcy, as amended in 1903, and in dismissing plaintiff's cause of action, and by holding and adjudging, that the District Court of the United States is without power and jurisdiction, to hear and determine a suit by the trustee, for the recovery of money, unlawfully paid by a bankrupt, as an unlawful transfer of property, which any creditor might have avoided, and recover the money so transferred.

Wherefore, the said M. C. H. Park, trustee of the estate of Slayden-Kirksey Woolen Mill, a bankrupt, plaintiff in error, prays that the judgment of the United States District Court for the Western District of Texas, be reversed and that said District Court be directed to grant a new trial in said cause.

RHODES S. BAKER,
JOHN NEETHE,
JAMES D. WILLIAMSON,

Attorneys for M. C. H. Park, Trustee of the Estate of Slayden-Kirksey Woolen Mill, plaintiff in error; plaintiff in the lower Court.

(Endorsed as follows, to-wit: No. 102. At Law. M. C. H. Park, Trustee of the Estate of Slayden-Kirksey Woolen Mill, a bankrupt, vs. W. W. Cameron, et al. Assignments of errors. Filed Oct. 1st, 1913. D. H. Hart, Clerk.)

UNITED STATES OF AMERICA—ss:

THE PRESIDENT OF THE UNITED STATES

To the Honorable the Judge of the District Court of the United States for the Western District of Texas —Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between M. C. H. Park, Trustee of the estate of Slayden-Kirksey Woolen Mill, bankrupt, plaintiff in error, and W. W. Cameron and E. R. Bolton, defendants in error, a manifest error hath happened, to the great damage of the said M. C. H. Park, Trustee, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date hereof, in the said United States Supreme Court,, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice

of the United States, the 1st day of October, in the year of our Lord, one thousand nine hundred and thirteen.

(SEAL) D. H. HART,

Clerk of the United States District Court
for the Western District of Texas.

Allowed this, the 1st day of October, 1913.

T. S. MAXEY,

United States Judge.

(Indorsed as follows, to-wit: No. 102 Law. M. C. H. Park, Trustee, vs.—Writ of Error—W. W. Cameron and E. R. Bolton. Issued Oct. 1, 1913. Filed Oct. 1, 1913. D. H. HART, Clerk.)

THE UNITED STATES OF AMERICA, FIFTH JUDICIAL CIRCUIT.

THE PRESIDENT OF THE UNITED STATES

To W. W. Cameron and E. R. Bolton, McLennan County, Texas—Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court at Washington, D. C., within thirty days from the date hereof, pursuant to writ of error sued out and filed in the Clerk's office of the District Court of the United States for the Western District of Texas, in the cause wherein M. C. H. Park, Trustee of the estate of Slayden-Kirksey Woolen Mill, bankrupt, is plaintiff in error, and W. W. Cameron and E. R. Bolton are defendants in error, to show cause, if any there be, why the judgment rendered against the said M. C. H. Park, Trustee, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward D. White, Chief Justice of the United States, this 1st day of October, in the year of our Lord one thousand nine hundred and thirteen.

Signed this the 1st day of October, 1913.

(SEAL) T. S. MAXEY,

United States Judge.

(Marshal's Return: Received this Writ on the 3rd day of October, A. D. 1913, and served the same on the 14th day of October, A. D. 1913, by delivering a true copy hereof,

duly certified by the Clerk of the Court, to each of the within named defendants in error, W. W. Cameron and E. R. Bolton, at Waco, Texas. J. H. ROGERS, United States Marshal, Western District of Texas. By J. A. ROGERS, Deputy.)

(Indorsed as follows, to-wit: No. 102 Law. M. C. H. Park, Trustee, vs.—Citation—W. W. Cameron and E. R. Bolton. Issued Oct. 1, 1913. Filed Oct. 1, 1913. D. H. HART, Clerk.)

Office of J. D. Williamson, Attorney at Law.
Rooms 1 to 6 Powers Building, 113 1-2 South Fourth Street, Waco, Texas. Oct. 2nd, 1913.

MR. L. B. MCCULLOCH,
Dep. Clk. U. S. Court, City.

Dear Sir: You will please prepare for me at once, the record in the case of M. C. H. Park, trustee, vs. W. W. Cameron and E. R. Bolton. The order of such record on writ of error to be as follows:

1. Style of court and caption;
2. Plaintiff's amended petition;
3. Citation;
4. Marshal's service.
5. Amended answer of defendants;
6. Judgment;
7. Bill of exceptions;
8. Petition for writ of error; and order allowing the writ;
9. Assignments of error;
10. Writ of error;
11. Citation;
12. Clerk's certificate.

Please give this matter your immediate attention and deliver me the record prepared as above indicated at the earliest possible moment, and oblige. Yours truly,

J. D. WILLIAMSON.
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(Indorsed as follows, to-wit: No. 102 Law. M. C. H. Park, Trustee, vs. W. W. Cameron, et al. Praecipe for Record on Appeal. Filed 3 day of October, 1913. D. H. HART, Clerk. By L. B. MCCULLOCH, Deputy.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the Western District of Texas—Greeting:

You are hereby commanded to serve W. W. Cameron and E. R. Bolton, of Waco, Texas, or their Attorneys of Record, Messrs. Sleeper, Boynton & Kendall, Waco, Texas, with the accompanying Certified Copy of Praecipe for record on writ of error to Supreme Court, filed by J. D. Williamson, Attorney for Plaintiff, in Case No. 102 Law, and styled M. C. H. Park, Trustee, vs. W. W. Cameron, et al.

Herein fail not, and due return of this Writ make.

WITNESS, the Honorable T. S. Maxey, Judge of the District Court of the United States, W. D. Texas, and the Seal of the District Court of the United States for the Western District of Texas, at Waco, Texas, this 3rd day of October, A. D. 1913.

D. H. HART,

(SEAL) Clerk of said Court.

By L. B. MCCULLOCH, Deputy.

United States Marshal, Oct. 5, 1913. Western Dist. of Texas.

(Marshal's Return: Received this Writ on the 3rd day of October, 1913, and I executed the same on the 3rd day of October, 1913, by delivering to Ben G. Kendall, a member of the firm of Sleeper, Boynton & Kendall, in person, at Waco, Texas, in my District, the accompanying copy named in this

Writ, certified by the Clerk of this Court. J. H. ROGERS, U. S. Marshal, W. D. T. By J. A. ROGERS, Deputy. Fee $2.00. Total $2.00.)

(Indorsed as follows, to-wit: No. 102 Law. United States District Court, Western District of Texas, at Waco. M. C. H. Park, Trustee, versus W. W. Cameron, et al. Writ to Serve Copy of Praecipe for Record on Writ of Error to Supreme Court on Sleeper, Boynton & Kendall. Issued October 3, 1913. D. H. HART, Clerk. By L. B. MCCULLOCH, Deputy. Returned and filed October 7, 1913. D. H. HART, Clerk. By L. B. MCCULLOCH, Deputy. Received 10-3-13. Marshal's Docket No. 89.)

(October 17, 1913. It appearing from the Marshal's return on this Writ that a certified copy of praecipe filed by plaintiff in error designating the portions of the record to be incorporated in the transcript was duly served on the attorneys for defendants in error, on, to wit, the 3rd day of October, A. D. 1913, and that more than ten days have elapsed since the date of said service: And the defendants in error having filed in the Clerk's office no praecipe for additional portions of the record to be incorporated in the transcript: The record is therefore ordered printed as requested in praecipe of plaintiff in error. D. H. HART, Clerk. By L. B. MCCULLOCH, Deputy.)

CLERK'S CERTIFICATE.

The United States of America,
Western District of Texas.

I, D. H. Hart, Clerk of the District Court of the United States in the Fifth Circuit and in and for the Western District of Texas, do hereby certify that the foregoing thirty-three (33) pages contain a true and correct copy and transcript of the record, bill of exceptions, assignments of error, and all of the proceedings in Cause No. 102 at Law, wherein M. C. H. Park, Trustee of the Estate of Slayden-Kirksey Woolen Mill, Bankrupt, is plaintiff, and W. W. Cameron and E. R. Bolton are defendants, except that the original Writ of Error and the Original Citation in Error are included therein instead of copies thereof, as fully as the same remain on file and of record in my office at Waco, Texas.

WITNESS my official signature and the seal of the said District Court of the United States, at my office (SEAL) in the City of Waco, Texas, this the 21st day of October, A. D. 1913.

D. H. HART, Clerk.

By L. B. McCulloch, Deputy.

No. 293.

Supreme Court of the United States

M. C. H. PARK, Trustee,

vs.

W. W. CAMERON and E. R. BOLTON.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

It is alleged that about April 10, 1911, Slayden-Kirksey Woolen Mill, a corporation transferred to W. W. Cameron and E. R. Bolton, for the purpose of defrauding the creditors of said corporation, the sum of $8,250.00 in cash.

It is alleged that afterwards about January 24, 1912, Slayden-Kirksey Woolen Mill was adjudged a bankrupt, and that the administration of its affairs is being had by the District Court of the United States for the Western District of Texas at Waco, and that plaintiff in error had become and is the duly qualified and acting trustee of the affairs of said bankrupt.

Plaintiff's amended petition was filed February 27, 1913. Plaintiff in error as such trustee in bankruptcy sues herein to avoid the fraudulent transfer by the bankrupt to W. W. Cameron and E. R. Bolton of its property and to recover such property or its value from defendants in error, alleging the fraudulent and active participation of the defendants in error in the transactions through which the transfer was accomplished and their want of bona fides. (The amended petition presenting the case of plaintiff in error appears at pages 3-8 of the Transcript of Record).

In due course defendants in error appeared and excepted to the jurisdiction of the court as follows:

> "Defendants demur, except and object to the jurisdiction of this court and say that this court is without jurisdiction to entertain, hear and determine plaintiff's cause of action as alleged herein and grant plaintiff relief as in his first amended petition alleged and prayed for, and of this defendants pray judgment of the court. (Tr. of Rec. p. 12)."

The exception to the jurisdiction was argued and resulted in a ruling of the court sustaining the demurrer and dismissing the cause, the judgment of dismissal reciting, among other things,

> "And the court being of the opinion that it is without jurisdiction to hear and determine a suit for the recovery of money paid by a bankrupt under Section 23-b of the Acts of Congress relating to bankruptcy as amended in 1910, and under Section 70-e of Acts of Congress relating to bankruptcy as amended in 1903, and that this cause should be dismissed without prejudice to the right

of plaintiff to file suit in such other form and in such other forum as he may deem proper; it is, therefore, ordered, adjuded and decreed by the court, etc." (Tr. of Rec. p. 16).

Within the time allowed for filing bill of exceptions and suing out writ of error bill of exceptions was prepared, approved and filed, writ of error was sued out and served, assignments of error were filed (Tr. of Rec. pp. 22-30), and thereafter in due course transcript of record was filed in this court and printed.

THE QUESTION INVOLVED.

The sole question involved is, Whether a court of bankruptcy, under sections 23-b and 70-e of the Bankruptcy Act, as amended in 1903 and 1910, has jurisdiction to entertain an action by the trustee in bankruptcy to avoid fraudulent transfers by the bankrupt of its property and to recover the property so transferred, or its value, from the fraudulent transferree.

The question was raised in the trial court by exception to plaintiff's first amended original petition, and the ruling of the trial court on the issue being adverse to plaintiff in error is brought by him to this court for review upon two assignments of error, which are adopted as propositions, as follows:

ASSIGNMENTS OF ERROR.

First.

That the United States District Court in and for the Western District of Texas, sitting at Waco, erred in sus-

taining the special exception and demurrer interposed by defendants, W. W. Cameron and E. R. Bolton, to the effect that the District Court was without jurisdiction to hear and determine plaintiff's cause of action, and in dismissing said cause of action.

SECOND.

Said Court erred in sustaining the special exception of defendants, W. W. Cameron and E. R. Bolton, to the effect that the United States District Court was without power and jurisdiction to hear and determine this suit under Section 23-b of the Acts of Congress relating to bankruptcy as amended in 1910, and under Section 70-e of the Acts of Congress relating to bankruptcy as amended in 1903, and in dismissing plaintiff's cause of action, and by holding and adjudging that the District Court of the United States is without power and jurisdiction to hear and determine a suit by the trustee for the recovery of money unlawfully paid by a bankrupt as an unlawful transfer of property which any creditor might have avoided, and recover the money so transferred (Tr. of Rec. pp. 25-6).

HISTORY OF THE AMENDMENTS OF 1903 & 1910.

Section 23-b of the Bankruptcy Act being pertinent to the question presented in this cause, will immediately be quoted, its original provisions in ordinary type, the language added by amendments of 1903 in italics, and the language added by the amendments of 1910 in capitals:

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought

or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under Section 60, Subdivision b, Section 67-e* AND SECTION 70, SUBDIVISION E."

Prior to the adoption of the 1903 amendments to Section 23-b, it was already provided in Section 60, Subdivision b that for the recovery by the trustee in bankruptcy of *preferences* "any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Other provisions of Subdivision b were changed in reading, but the jurisdictional language was left unchanged. Subdivision 8 of Section 1 defines the term "court of bankruptcy" as follows: "Courts of Bankruptcy shall include the district courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska."

In 1903 Section 67, Subdivision e, was amended by adding identical language to that just quoted from Section 60, Subdivision b.

At the same time Section 70, Subdivision e, was also amended by adding to its provisions identical langauge to that quoted from Section 60, Subdivision b.

The 1903 amendments to Section 23-b were consistent with the contemporaneous amendments to Subdivision 60-b and

67-e, but were not consistent with the 1903 amendments to Section 70-e. The Senate struck out of Section 23-b an express reference to Subdivision 70-e which had been placed in the exception clause by the House, and thereby left in the Bankruptcy Act as amended an inconsistency between those Sections. As a natural result the courts fell into some confusion over the question as to whether a court of bankruptcy could entertain jurisdiction of a suit brought by the trustee in bankruptcy under Section 70-e, the weight of opinion seeming to be that because Section 23-b made no reference to Section 70-e that a suit under the latter section could not be brought in the bankruptcy court except upon consent of the defendant.

To remove this seeming inconsistency Congress, in 1910, amended Section 23-b by including an express reference to Section 70-e along with the existing reference to the other subdivisions of Sections 60 and 67, so that Section 23-b would embrace in one consistent sentence *three* exceptions to the rule that suits by trustee should be brought in those courts only (unless by consent) where the bankrupt might have brought them but for bankruptcy, and since that time the section as amended takes out of the general rule (denying jurisdiction of courts of bankruptcy under ordinary conditions) suits arising under any of the subdivisions referred to in the several amendments, viz: subdivisions of Sections 60, 67 and 70.

The composite statutory provisions on the subject in force at the time of the commencement of the instant suit, therefore, appear from placing in juxtaposition the material provisions of Sections 23-b and 70-e as amended, as follows:

SECTION 23.

Suits by the Trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under Section 60 Subdivision b, Section 67-e and Section 70, Subdivision e.

SECTION 70-E.

The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

ARGUMENT.

The jurisdiction of courts of bankruptcy to entertain the instant suit seems to be so unquestionable, in view of the foregoing statement, that we find difficulty in adding anything to the illumination afforded by the Statute itself.

We are not able to give this Court the theory upon which the trial court proceeded in disavowing jurisdiction. It is possible that opinions formed before the 1910 amendment to Section 23-b caused the trial court to consider the question as if previously foreclosed by the courts. A brief consideration, however, of a few pertinent decisions will show the fallacy of that viewpoint.

In Pirie vs. Chicago Title & Trust Company, 182 U. S. 438, it is held, that a transfer of money is a transfer of property within the meaning of the bankruptcy act and recoverable under the same circumstances that transfers of other property would be recoverable.

In Bardes, Trustee, vs. First National Bank, 178 U. S., 524, it was held prior to the 1903 amendments to section 23 of the Bankruptcy Act, that the courts of the United States were without jurisdiction to entertain except with the consent of the defendant suits for the recovery of assets of the bankrupt as against an adverse claimant. The ruling in that decision and the embarrassments put thereby upon administrations in bankruptcy, was the occasion for the 1903 amendments to section 23-b, section 67-e and section 70-e and the 1910 amendments to section 23-b.

In the matter of Wood & Henderson, 210 U. S., 246, the court discusses the purpose and effect of the 1903 amendments insofar as they relate to sections 23-b, 60-b and 67-e, and say:

> "It is true that by the amendments referred to (the act of February, 1903), concurrent jurisdiction with the state courts is now given to the Federal courts, of suits for the recovery of property under sections 60-b, and 67-e. These last-named sections have reference to suits to recover preferences or fraudulent conveyances."

Harris, Trustee, vs. First National Bank, 216 U. S., 382. Harris as trustee in bankruptcy brought suit in the District Court of the United States for the Eastern District of Texas to recover property held by a third person, which he alleged belonged to the bankrupt. His claim, if cognizable in a court of bankruptcy, arose under Section 70, Subdivision e, and not under the named subdivisions of either Sections 60 or 67. The 1910 amendments to the bankruptcy act had not been made, and accordingly Section 23-b contained no reference to Section 70-e, but referred only to the appropriate subdivisions of Sections 60 and 67. This court held:

> "It is to be noted that Section 70, Subdivision e, is not mentioned in the amendment to Section 23, enlarging the jurisdiction of the federal court to entertain suits without the consent of the defendant; and it has been held that suits under Section 70, Subdivision e, can only be brought in a court of bankruptcy with the consent of the defendant. Hull vs. Burr, 153 Fed. 945. The contrary view was taken in Hurley vs. Devlin, 149 Fed. 258.
>
> "But we do not find it necessary to pass upon that question. Assuming for this purpose that actions may be

> brought by trustees in the courts of bankruptcy in cases coming within the terms of Section 70, Subdivision e, without the consent of defendant, we do not think the present action is one of that character."

Continuing, this court concluded that the nature of the action was such as not to arise under Section 70, Subdivision e, and therefore, was not one within the jurisdiction of the court of bankruptcy under either of the conflicting views as to the effect of omitting from Section 23 of the Bankruptcy Act all reference to Section 70, Subdivision e of that Act.

Hull vs. Burr, 153 Fed., 945, elaborates the view succinctly stated by this court in the foregoing quotations, that Section 23-b as it was left in the 1903 amendment was not effective to confer jurisdiction of suits to recover property of the bankrupt fraudulently transferred. Its reasoning so clearly shows that a contrary conclusion would have been then reached if Section 23-b then read as it now reads that we quote the entire paragraph:

> "But there is another reason why Section 70-e cannot be relied on as giving the court below jurisdiction in this cause, Subdivision b of Section 23 provides that trustees shall sue only in the courts where the bankrupt might have brought suit if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. This limitation is general in its terms, embracing all suits. Congress by the amendment of 1903 excepted from its limitation certain suits which may now be brought in the bankruptcy courts without the consent of the defendant. The suits excepted are suits for the recovery of property under Section 60, Subdivision b, and Section 67, Subdivision e. The statute requiring the consent of the proposed defendant stands as enacted with

no other exceptions than the one given. *If that exception had included suits for the recovery of property under Section 70, Subdivision 3, then, clearly, suits under that subdivision could have been brought by the trustee in a court of bankruptcy without the consent of the defendant.* (Italics are ours.)

"It is stated by Collier in his work on Bankruptcy (5th edition, p. 266) that the amendment was at first so written, but that the Senate judicial committee struck out 'And Section 70, Subdivision e.' The act as it was passed by Congress leaves suits under that subdivision still subject to the provision of Section 23b, requiring the consent of the proposed defendant. Construing Section 70-e in connection with Section 23-b, it appears that the former conferred jurisdiction on courts of bankruptcy of suits to avoid transfers of property made by a bankrupt which any creditor of the bankrupt might have avoided, but that although jurisdiction of the subject matter is conferred it can only be exercised over the persons of the defendants by their consent. The reasons for this conclusion are clearly and ably stated by Judge Adams in Gregory vs. Atkinson, 127 Fed. 183."

Congress has now supplied the identical language which the Circuit Court of Appeals in the foregoing quotation say would put beyond question the right of a court of bankruptcy to entertain jurisdiction without the consent of the defendant.

Hurley vs. Devlin, 149 Fed. 268, referred to by this court as stating the contrary rule, holds that notwithstanding the failure of the 1903 amendments to Section 23-b to refer expressly to Section 70e, effect must be given by the courts to the 1903 amendment to the latter section (which was adopted at the same time as was the 1903 amendment to Section 23) which in terms provides for jurisdiction in a court of bankruptcy over controversies arising under Section 70-e.

Skewis vs. Barthell, 152 Fed., 534.

In this decision the District Judge for the Northern District of Iowa adopts the same line of thought as is stated in the case of Hull vs. Burr, pointing out the significance of the Senate changes in the House Bill amending the Bankruptcy Act in 1903, and concluding with the following language:

> "The omission of Section 70-e as amended, from the amendment to Section 23-b therefore, was not accidental but was designedly done."

Lynch vs. Bronson, 160 Fed., 139.

This case holds that even under the amendments of 1903, the courts of bankruptcy were given jurisdiction to entertain suits under Section 70-e without the consent of the proposed defendant. The reasoning in support of this conclusion is strong, but as previously stated in this brief the weight of authority is contrary to its conclusions.

Newcomb vs. Biwer, 199 Fed., 529. Holds:

> "If this is a case which comes within the provisions of subdivision 70-e of the bankruptcy act it is within the exception provided by the amendment of June 25, 1910 to Section 23-b of the bankruptcy act. It seems that the only purpose of these amendments was to make exceptions to the limitation on the jurisdiction of the district courts and thereby extend their jurisdiction to such cases as were brought under the authority provided by Sections 60-b, 67-e and 70-e. I think it is very clear that Section 23-b of the bankruptcy act as amended by the acts of 1903 and 1910 gives jurisdiction to this court of all suits brought for the recovery of property under

> Section 60-b, 67-e and 70-e. * * * I therefore hold that actions may be brought by trustees in the courts of bankruptcy in cases coming within the terms of Section 70-e without the consent of the defendant, since the amendment of Section 23-b by the act of Congress June 25, 1910."

Parker vs. Sherman, 195 Fed., 648.

This action was brought under Sections 70-e to recover property fraudulently transferred.

The court discusses the effect of the amendments of 1910; quotes earlier conflicting decisions; quotes the amendment itself; and concludes:

> "This amendment brings into the law what the Senate struck out in the amendment of 1903, and clearly covers the case at bar."

Wood vs. Wilbert's Sons Shingle & Lumber Co., 226 U. S., 384.

The litigation as well as the controversy involved in the decision in the Wood case was begun before the 1910 amendments. It was brought in the district court of the United States for the Eastern District of Louisiana, under the supposed authority of Section 70-e of the bankruptcy act. The trial court sustained plea to jurisdiction upon the authority of Hull vs. Burr, 153 Fed., 945. This court following the reasoning of Hull vs. Burr holds that the language of Section 23-b as left by the amendments of 1903, was not broad enough to justify suits in the courts of bankruptcy without the consent of the proposed defendant, notwithstanding the 1903 amendments to Section 70-e, and calls attention to the

fact that under the law as amended in 1903 the only exceptions consistently provided for are suits for the recovery of property under Section 60-b and Section 67-e; and that the express mention of those two exceptions by implication excludes any other. Since the 1910 amendment, however, which expressly brings into this same group of exceptions all suits brought under sanction of Section 70-e, the decision in Wood vs. Wilbert's Lumber Co. is as strong an implicatory holding that the instant suit was properly brought as need be found.

Plaintiff in error respectfully prays that the judgment of the District Court of the United States for the Western District of Texas, Waco Division, in this matter be reversed, and that cause be remanded with instructions that it do set aside its order of dismissal in this case, and that it do entertain jurisdiction of this suit, and for such other instructions as may be consistent with the rights of plaintiff in error, as shown in the record herein.

Respectfully submitted,

JOHN NEETHE, of Galveston, Texas,
J. D. WILLIAMSON, of Waco, Texas,
RHODES S. BAKER, of Dallas, Texas.

No. 293

IN THE

Supreme Court of the United States

M. C. H. PARK, TRUSTEE,

Plaintiff in Error,

vs.

W. W. CAMERON AND E. R. BOLTON.

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

We do not concur in the statement of the case as made in brief of plaintiff in error, as such statement is insufficient to properly inform the court of the true character and nature of the cause of action alleged by the plaintiff. In our opinion this is not an action to avoid any transfer and for recovery of property, specific property, or, on failure to produce the

property *its* value, within the contemplation and terms of Section 70-e of the Bankruptcy Act, but is merely a suit for the recovery of a money claim and judgment; and in order that the court may be correctly informed, and enabled to reach its own conclusions, we here quote and set forth plaintiff's first amended petition, which reads as follows:

"Now comes M. C. H. Park, hereinafter styled plaintiff, and with leave of the court files this, his first amended original petition in lieu of his original petition heretofore filed and bringing this suit, in his capacity as the duly elected, qualified and acting trustee in bankruptcy of Slayden-Kirksey Woolen Mill, a corporation formed under and by virtue of the laws of the State of Texas, and heretofore doing business in the city of Waco, McLennan County, Texas, and as plaintiff complains of W. W. Cameron and E. R. Bolton, who also reside in McLennan County, Texas, and for cause of action respectfully represents:

"That on or about April 10, 1911, the said Slayden-Kirksey Woolen Mill transferred to the defendants herein, and for the purpose of defrauding the creditors of said corporation, the sum of $8,250.00 in cash; that at the time said moneys were so received by the defendants such moneys were the property of the Slayden-Kirksey Woolen Mill.

"And this plaintiff would further show that some time prior to December 8, 1909, the defendants herein were the holders and owners of a large amount of capital stock of said defunct corporation, both preferred and common, and were members of the board of directors thereof, and the said W. W. Cameron was its treasurer and so remained until the adjudication in bankruptcy of said corporation, as hereafter more fully stated; that 275 shares of the capital stock of said corporation were heretofore owned by one Altgeld, who, having ascertained that the stock was of little value, endeavored to sell, and offered the same frequently in the open market, at a very low figure; that the defendants herein, for the purpose of preventing the depression in the open market of the value of the capital stock of said corporation, purchased the said 275 shares of the stock.

"That thereafter, and to reimburse themselves for the amount paid to the said Altgeld, these defendants sold these 275 shares to one A. V. Harris, taking in payment therefor two promissory notes executed by A. V. Harris for $4,125.00 each, dated December 8, 1909, and due twelve months after date, one of said notes being payable to the defendant herein, W. W. Cameron and the other being payable to the defendant herein, E. R. Bolton.

"That to secure the payment of said notes there were attached thereto, as collateral security certificates for the 275 shares of stock so sold by the said defendants herein to the said Harris.

"That after the purchase of said stock by the said Harris, he ascertained that said defendants had overreached him, in the sale of said stock; that the consideration for his said note had wholly failed, said stock being of no value and he denied that he was liable on the notes executed by him to the defendants as hereinbefore more fully set out.

"That thereafter and for the alleged purpose of enforcing the payment of said notes, on or about January 24, 1911, the defendant herein, W. W. Cameron, commenced in the District Court for the Nineteenth Judicial District, McLennan County, Texas, an action at law, alleging in the petition filed therein that he, the plaintiff therein, W. W. Cameron, was the owner and holder of the two notes hereinbefore more fully described, and he prayed for judgment against the defendant in said suit, the said A. V. Harris, for the amount of said notes, and for a foreclosure of the lien on the collateral attached thereto as hereinbefore more fully set out.

"That thereafter, on or about April 10th, 1911, the defendants, conspiring with one S. F. Kirksey, Jr., at that time the general manager and in charge of the affairs of the said corporation, induced the said S. F. Kirksey, Jr., to make a pretended purchase of said stock from defendants, but in fact, for and on account of said defunct corporation, and to use in payment of his pretended purchase of said stock the funds of said corporation in said sum of $8,250.00, said

misapplication of funds being wrongful to the knowledge of defendants, they being then directors of said corporation, and knowing its financial condition.

"That in truth and in fact this pretended purchase was wholly void, in that said corporation, at the time of said pretended purchase, had no funds with which to purchase its own capital stock and had no legal powers so to do; that said corporation was at the time of said frauds of the defendants heavily involved; was obtaining all possible extensions of its indebtedness, and said transactions were had in contemplation of bankruptcy or other insolvency liquidation and of actual insolvency, and all such conditions shortly afterward became notorious.

"That said purchase was a pretense to purchase from these defendants the amount of said stock, and that the funds of said corporation were directly transferred to the said two defendants by the checks of the corporation, drawn by said Kirksey, Jr., on or about April 10th, 1911, one in the sum of $4,125.00 to the order of W. W. Cameron and the other in the same sum to the order of the defendant, E. R. Bolton, and said defendants received and retained the funds of the corporation upon said checks in the full amount of same, and thereby have depleted the funds of said corporation to the injury of its creditors.

"That at the time said checks were so issued to the order of said defendants and received by them, they knew, or by the exercise of reasonable and due diligence could have known, that the said defunct corporation was not indebted to the said S. F. Kirksey, Jr., in the amount of said checks, or in any amount whatsoever; that they also knew that the said defunct corporation was wholly and hopelessly insolvent and that the stock so pretended to be sold by them, either to the said Kirksey, or to the said corporation, was of no value whatever; that at the time said moneys were so received by the defendants, they and each of them knew that such moneys were the property of the said Slayden-Kirksey Woolen Mill.

"That the said defunct corporation did not in any manner, shape or form authorize said transactions, nor ratify same,

nor derive any benefit whatever from the payment by it of the said sum to the defendants herein, or by the delivery to it of said stock, and that the defendants herein were at all times fully aware of all the facts herein stated.

"That to conceal said misapplication of funds said defendants caused entries to be made upon the books of said corporation, making said transaction appear to be a purchase of said stock by Kirksey, Jr., but such appearance was contrary to the facts, and the defendants knew said S. F. Kirksey, Jr., was not to repay said funds to said corporation, and it was understood that same was not to be repaid to it, and that said liability was not in fact a *bona fide* one nor intended to be a *bona fide* one, and same was afterward, pursuant to the original conspiracy, cancelled and retired.

"And this plaintiff would further show that on or about the 24th day of January, 1912, the said corporation, Slayden-Kirksey Woolen Mill, was duly adjudged a bankrupt; that this your petitioner, as hereinbefore stated, was duly elected trustee of the creditors of said corporation, and that its affairs are now being administered before the honorable referee in bankruptcy of this honorable court, and that by such election this plaintiff became vested with and entitled to all the assets and choses in action of said bankrupt corporation, including the claim hereinbefore more fully stated against these defendants herein.

"That there will be a deficiency between the amount realized from all of the assets of this corporation and the amount due to its creditors, much larger than the amount sought to be recovered herein.

"Wherefore, plaintiff prays, citation having issued, and that upon a hearing hereof he, in his capacity as aforesaid, may have judgment against the defendants and each of them, for the aforesaid amount, together with interest thereon at the rate of 6 per cent per annum from the date of its payment, and for costs of suit, and he prays for such other and further relief that he may be entitled to at law or equity." (Tr. pp. 3-8.)

Defendants in error filed an exception to the jurisdiction of the court, as follows:

"Defendants demur, except and object to the jurisdiction of this court, and say that this court is without jurisdiction to entertain, hear and determine plaintiff's cause of action as alleged herein and grant plaintiff relief as in his first amended petition alleged and prayed for, and of this defendants pray judgment of the court." (Tr. p. 12.)

Defendants also filed a general demurrer, and an answer on the merits to plaintiff's said amended petition. (Tr. pp. 12-15.)

The court sustained the demurrer and exception to the jurisdiction of the court to hear and determine this action and entered a judgment of dismissal, "without prejudice to the right of plaintiff to file suit in such other form and in such other forum as he may deem proper." (Tr. pp. 16-17.)

THE QUESTION INVOLVED.

The question here involved is not as stated under this head on page 3 of brief of plaintiff in error, whether the court of bankruptcy, the District Court of the United States, under Sections 23-b and 70-e of the Bankruptcy Act, as amended in 1903 and 1910, has jurisdiction to entertain an action by the trustee in bankruptcy to avoid fraudulent *transfers* by the bankrupt of his property and to *recover the property transferred* or *its* value.

But the question involved, and sole question to be determined, is whether the cause of action in the suit at bar, as alleged in plaintiff's amended petition, is of a character and nature included and embraced within, and therefore comes under, Section 70-e of the Bankrupt Act. If so, it is conceded that by the 1910 amendment of Section 23-b of said act, the court of bankruptcy, the District Court of the United States, is vested with concurrent jurisdiction with the State

court over such case. But it is contended by defendants in error that plaintiff's action herein, as alleged and set forth in his said amended petition, is not included and does not come within the terms of Section 70-e of the Bankrupt Act.

DEFENDANTS' COUNTER-PROPOSITIONS IN ANSWER TO PLAINTIFF IN ERROR'S FIRST AND SECOND ASSIGNMENTS OF ERROR.

First Counter-Proposition.

That plaintiff's cause of action, as alleged and set forth in his amended petition, is not embraced within the terms of Section 70-e of the Bankruptcy Act, and the 1910 amendment to Section 23-b, not being an action to avoid a *transfer* and *recover specific property* or *its* value, but is merely a suit for recovery of a money claim and judgment, and the District Court of the United States was without jurisdiction to hear and determine same; and the court was therefore correct and committed no error in sustaining defendants' exception and dismissing said case for want of jurisdiction.

Second Counter-Proposition.

That the court was correct in its ruling and committed no error in sustaining defendants' exception to the jurisdiction of the District Court of the United States and dismissing this action, because the allegations contained in plaintiff's said amended petition do not show any transfer by the bankrupt of its property which any creditor might have avoided, in fact, does not show any transfer at all by the bankrupt, and, therefore, plaintiff's cause of action is not embraced within the terms of Section 70-e of the Bankruptcy Act.

STATEMENT.

Section 23-b of the Bankruptcy Act, as amended in 1910, being as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under Section Sixty, Subdivision b, and Section Sixty-seven, subdivision e, and Section Seventy, subdivision e."

And Section 70-e as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It is affirmatively alleged in plaintiff's said amended petition, in alleging the facts showing the manner in which the money was paid defendants, that same was not the act of the bankrupt corporation, the Slayden-Kirksey Woolen Mill, but of one S. F. Kirksey, Jr., holding the position of general manager of the woolen mill, and of defendants, who are alleged to have conspired with said Kirksey for him to make a pretended purchase of certain corporate stock of said corporation from defendants and make wrongful misapplication of the funds of the corporation, the bankrupt, in payment for said stock, all without the knowledge or consent of the *bankrupt,* and without authority, and that such transfer was

never in any manner ratified by the *bankrupt.* (Plaintiff's Amended Petition, Tr. pp. 3-8, and quoted in first part of this brief.)

ARGUMENT.

It is submitted and urged by defendants in error that the *only* actions referred to, provided for and embraced within the terms of Section 70-e of the Bankruptcy Act, are actions to avoid and set aside "transfers" made by the bankrupt of his property and recover "the property" so transferred, meaning *specific property,* or *its* value.

From an examination of plaintiff's first amended petition, it will be found that the cause of action therein alleged is not an action to avoid, set aside, any *transfer* of *property,* or for the recovery of the property transferred, the recovery of any *specific property* or *its* value, the value of "the property so transferred;" nor a cause of action within the terms of Sections 70-e of the Bankruptcy Act.

It is true that the second paragraph of said amended petition alleges "that on or about April 10, 1911, the said Slayden-Kirksey Woolen Mill transferred to the defendants herein, and for the purpose of defrauding the creditors of said corporation, the sum of $8,250.00 in cash; that at the time said moneys were so received by the defendants such moneys were property of the Slayden-Kirksey Woolen Mill." But the allegations contained and set forth in other portions of said amended petition show that the transactions complained of occurred in connection with the purchase and sale of certain corporate stock of said woolen mill, money transactions, not involving a preference or concealment of property, and said petition does not undertake to describe or seek the recovery of any *res,* specific money or property, or if the property be not in existence, be not produced, *its* value.

The character and nature of plaintiff's cause of action, as evidenced by the relief prayed for, is not to avoid, set aside, any *transfer* or *recover property*, specific property, or *its* value, but is merely an action for the recovery of a money claim or judgment. The prayer of plaintiff's said amended petition, setting forth the relief prayed for, reading as follows:

"Wherefore, plaintiff prays, citation having issued, and that upon hearing hereof, he, in his capacity as aforesaid, may have judgment against the defendants and each of them, for the aforesaid amount, together with interest thereon at the rate of 6 per cent per annum from the date of its payment and for costs of suit, and he prays for such other and further relief that he may be entitled to at law or equity." (Tr. p. 8.)

None of the cases cited in brief of plaintiff in error are in any sense controlling, or of any aid to the court in reaching a decision in this case. Each and all said cases, with the sole exception of the case of Pirie vs. Chicago Title & Trust Co., 182 U. S., 438, relate to and involve the avoiding and setting aside of a transfer of some specific property, either lands or stocks of merchandise and recovery of same. And said case of Pirie vs. Chicago Title & Trust Co., *supra,* merely construes the effect to be given to the word "property," transfer of property, in determining what was or was not a "preference" within the meaning of Section 60-a of the Bankruptcy Act, relating to preferences, the court in said case holding that in the contemplation of Section 60-a of the Bankruptcy Act, relating to matter of preferences, that "money" was embraced within the term property as used in said section of the Bankruptcy Act. But the court in said case does not undertake to define what is meant by and embraced in the term "transfer of property" as used in Sections 70-e and 23-b of the Bankruptcy Act, in the sense of *conferring jurisdiction.*

The court in the case of Pirie vs. Chicago Title & Trust Co., *supra,* merely holding that the payment of the money there in question constituted a preference, and as such, under Section 57-g, claimant must surrender the preference that he had received before any claim by him against the estate can be allowed. It will also be recalled that the opinion in said case of Pirie vs. Chicago Title & Trust Co., *supra* was rendered by a divided court. While in the case at bar the question is one of determining the *forum* in which a particular cause of action such as that alleged in plaintiff's said amended petition shall be brought.

There is no question but what this action can be maintained in the state court, and the only question to be here determined is whether the District Court of the United States by the terms of Sections 70-e and 23-b is also vested with jurisdiction over such action, viz., given concurrent jurisdiction with the state court.

While in plaintiff's said amended petition it is alleged that the money was transferred to defendants to defraud creditors, this must be construed in connection with the further allegations showing the manner of the transfer; to-wit, that it was done by one Kirksey, general manager of the bankrupt, without the knowledge or consent of the bankrupt, and without authority, and that such transfer was never in any way ratified by the bankrupt. Under these conditions it cannot be said there was ever a fraudulent transfer by the bankrupt, or any transfer by the bankrupt which might be avoided by creditors, as is contemplated by Section 70-e. Plaintiff's action being in its nature an action in tort for the alleged wrongful misapplication and conversion of funds of the bankrupt by one Kirksey, agent of the bankrupt, and defendants, without the knowledge, consent or authority of the bankrupt, and which act was never ratified by the bankrupt.

The bankrupt, if there had been no bankruptcy proceedings, could have brought the same suit as the plaintiff as the trustee in bankruptcy has brought herein, and the suit must in such case, under Section 23-b, be brought in the tribunal or court in which the bankrupt might have sued if proceedings in bankruptcy had not been instituted, unless by consent of defendants; viz., in the state court.

In the case of Bardes, trustee, vs. First National Bank, 178 U. S. 524, cited in brief of plaintiff in error, the court, after quoting the second clause (23-b) of Section 23 of the Bankruptcy Act, that—

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estates is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant,"

Uses the following language:

"It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

Again the court in said opinion, after commenting upon the restrictions placed upon the jurisdiction of the courts of bankruptcy, District Court of the United States, by the Act of 1898 as compared with the Bankrupt Acts of 1867 and 1841, says:

"On the contrary, Congress, by the second clause of 23 of the present bankruptcy act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case.

"One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the state, to the greater economy and convenience of litigants and witnesses."

It is true that the opinion in the case of Bardes, Trustee, vs. First National Bank, *supra,* was rendered prior to the 1903 amendments to Section 23-b, Section 67-e and Section 70-e, and the 1910 amendment to Section 23-b, adding 70-e. But, as above shown, plaintiffs cause of action herein is not that of a preferential or fraudulent transfer coming under Sections 60-b or 67-e, or embraced within the terms of Section 70-e.

In each of the cases, Harris, Trustee, vs. First National Bank, 216 U. S., 382, Newcomb vs. Biwer, 199 Fed., 529, and Wood vs. Wilbert's Sons Shingle & Lumber Co., 226 U. S., 384, respectively, cited in brief of plaintiff in error, it is held that the causes of action there in question were not within Section 70-e, and that the District Courts of the United States had not jurisdiction of same. Particular attention is directed to the court's opinion in the case of Wood vs. Wilbert's Sons Shingle & Lumber Co., *supra,* because of the application of same to this case.

WHEREFORE, defendants in error respectfully submit that the lower court was correct and committed no error in sustaining defendant's exception to the jurisdiction of the District Court of the United States to hear and determine this cause of action, and in entering an order dismissing said action, without prejudice to the right of plaintiff to file suit in a court of proper jurisdiction, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

W. M. SLEEPER,
CHAS. A. BOYNTON,
BEN G. KENDALL,

Attorneys for Defendants in Error.

PARK, TRUSTEE OF SLAYDEN-KIRKSEY WOOLEN MILL, BANKRUPT, *v.* CAMERON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 293. Submitted May 14, 1915.—Decided June 1, 1915.

This action by the trustee to recover funds formerly belonging to the bankrupt corporation, not being a suit to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers who had appropriated the bankrupt's property without its assent, is not one within §§ 23b and 70e of the Bankruptcy Act, and the District Court properly dismissed the bill for want of jurisdiction.

THE facts, which involve the right of a trustee in bankruptcy to recover funds formerly belonging to the bankrupt, are stated in the opinion.

Mr. John Neethe, Mr. J. D. Williamson and *Mr. Rhodes S. Baker* for plaintiff in error.

Mr. Charles A. Boynton, Mr. W. M. Sleeper and *Mr. Ben G. Kendall* for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by a trustee in bankruptcy to recover funds formerly belonging to the bankrupt. The District Court dismissed the bill for want of jurisdiction. The defendants in error admit that the court had jurisdiction of a suit by the trustee to recover property fraudulently transferred by the bankrupt, §§ 23b, 70e, but deny that this is such a suit. The plaintiff says that it is—so that our decision must rest upon an analysis of the bill. The trouble with it is that the cause of action is not very steadily conceived;

but in view of what seem to us the dominant allegations we are of opinion that the decree was right.

If we stopped with the opening averment it is uncompromising: that the bankrupt transferred to the defendants, for the purpose of defrauding its creditors, $8,250 in cash. The declaration goes on to tell that the defendants, being largely interested in the bankrupt Corporation, bought 275 shares of one Altgeld to prevent the depreciation of the stock on the market; that they sold them to Harris, but had trouble about collecting the price (two notes for $4,125 each, secured by the stock), Harris discovering that he had been overreached; that thereafter the defendants, being directors, conspired with one Kirksey, the general manager, and induced him to make a pretended purchase of the stock, but really for the Corporation, and to use in payment for the same $8,250 of the Corporation's funds; that the Corporation had no funds with which to purchase its own stock but was heavily involved and that the sale was void; that the purchase was a pretense to purchase the stock from the defendants and that $4,125 of the Corporation's funds were received by each of them. Then it is alleged that the defendants knew or ought to have known that the Corporation was not indebted to Kirksey, that it was insolvent, and 'that the stock so pretended to be sold by them, either to the said Kirksey, or to the said Corporation, was of no value' and that the money received was the property of the bankrupt. So far it might seem that the declaration sustained the plaintiff's contention. But it continues that the Corporation did not authorize the foregoing transactions or ratify them, and that the defendants knew it; and 'that to conceal said misapplication of funds' the defendants caused entries to be made on the Corporation's books making the transaction appear to be a purchase of the stock by Kirksey, contrary to the facts, 'and the defendants knew said S. F. Kirksey, Jr., was not to repay said funds to said Corpora-

tion' and the liability was not intended to be a *bona fide* one and afterwards pursuant to the conspiracy was cancelled and retired. The other allegations are not material to the question before us. Those that we have recited seem to us in their conclusion to import not that the corporation has done anything, but that certain of its officers by false pretenses have withdrawn its funds. If so the suit is not to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers who have appropriated it without the bankrupt's assent, and therefore not within §§ 23b and 70e of the Act.

Judgment affirmed.